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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

CITY OF BURBANK, A MUNICIPAL CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether this suit seeking a declaratory judgment that the federal statute encouraging state unemployment compensation coverage for state and local government employees (26 U.S.C. 3301 *et seq.*) violates the Tenth Amendment, an injunction against the assessment and collection of federal unemployment taxes, and a refund of unemployment insurance contribution paid to the State of California, is barred by the Declaratory Judgment Act (28 U.S.C. 2201-2202), the Anti-Injunction Act (26 U.S.C. 7421(a)), and the doctrine of sovereign immunity.

2. Whether respondent lacks standing to bring this suit against the United States because the asserted injury cannot be traced to any action of the federal government, but instead arises from the obligation imposed by California law to pay unemployment insurance contributions to the state government.

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, the Secretary of Labor, the Secretary of the Treasury, and the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, but only if the Court grants the petition for a writ of certiorari filed by the City of Burbank in *City of Burbank* v. *United States*, No. 82-593.

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1a-5a),[1] is unreported. The district court's

[1] "Pet. App." refers to the appendix to the petition in *City of Burbank* v. *United States*, No. 82-593.

order of dismissal (Pet. App. 6a-7a) is also unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 53a) was entered on July 6, 1982. This petition is filed pursuant to Sup. Ct. R. 19.5, as a conditional cross-petition to the petition for a writ of certiorari in *City of Burbank* v. *United States*, No. 82-593, which was filed on October 1, 1982 and received by the Solicitor General on October 5, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 3310 and 7421(a) of the Internal Revenue Code of 1954 (26 U.S.C.), 28 U.S.C. 1331, the Tax Injunction Act (28 U.S.C. 1341), 28 U.S.C. 1346(a)(1) and the Declaratory Judgment Act (28 U.S.C. 2201-2202) are set forth in the Appendix, *infra*, 1a-4a. The pertinent portions of the Federal Unemployment Tax Act (1939) (26 U.S.C. (& Supp. IV) 3301-3311), are set forth at Pet. App. 55a-60a.

STATEMENT

Respondent brought this suit in the United States District Court for the Central District of California, seeking a declaratory judgment that the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667, which extend unemployment compensation under state law to state and local government employees, are unconstitutional under the Tenth Amendment. These amendments provide for denial of tax credits against the federal unemployment tax for private employers within a state if that state government fails to extend unemployment compensation to its employees. Respondent also sought an

injunction restraining the termination of tax credits for private employers and termination of federal grants that otherwise would result in states which fail to comply with these federal statutory amendments (Pet. App. 82a-84a). Finally, respondent sought a refund from the federal government of unemployment insurance contributions in the total amount of $123,599.84 that it had paid under state law to the State of California (Pet. App. 78a-82a).

Under the pertinent provisions of the Federal Unemployment Tax Act (1939) (FUTA) (26 U.S.C. (& Supp. IV) 3301 *et seq.*), Section 3304(a) requires the Secretary of Labor to approve any state unemployment compensation law which he finds conforms to the federal requirements set forth in that provision. Section 3304(c) requires the Secretary of Labor to certify to the Secretary of the Treasury each state whose law he has approved. This certification is to be made annually on October 31. The certification of the Secretary of Labor is the prerequisite for tax credits for private employers subject to the state law and for federal grants of money.

Section 3301 currently imposes a tax on most private employers equal to 3.4% of the first $6,000 of wages paid to each employee.[2] In turn, Section 3301 permits the employer to claim a credit against the FUTA tax for the employer's contributions to an unemployment fund maintained under state law.[3] This credit may not exceed 2.7% of such wages.[4] In any calendar year, however, an employer may claim this credit only if the state's unemployment compensation law "is cer-

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[2] See 26 U.S.C. 3301(1) and 3306(b)(1).

[3] 26 U.S.C. 3302(a)(1).

[4] See 26 U.S.C. 3302(a)(1), (c), and (d)(1).

tified as provided in section 3304 * * *" (26 U.S.C. 3302(a)(1)).

If the Secretary does not make the required certification on October 31, private employers within the state become ineligible for the FUTA tax credits for that year. An uncertified state also loses two kinds of federal grants related to unemployment. The first type of grant is for the costs of administering the state's unemployment compensation program.[5] The second grant is for the administration of public employment offices, which provide job-finding, placement and recruiting services.[6]

Section 115 of the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2670-2671, amended 26 U.S.C. 3304(a)(6) and 3309(a)(1)(B) (Pet. App. 56a-60a) to require, as a condition for certification, that state law provide unemployment compensation coverage for state and local government employees on the same terms and conditions as private employees. These amendments (the "1976 Amendments") apply with respect to certifications of states for 1978 and thereafter, but only with respect to services performed after December 31, 1977. Section 115(d), 90 Stat. 2671.

The district court dismissed respondent's complaint (Pet. App. 6a-7a) with prejudice on the ground that it was barred by res judicata as a result of respondent's participation as a plaintiff-appellant in *County of Los Angeles* v. *Marshall*, 631 F.2d 767 (D.C. Cir.), cert. denied, 449 U.S. 837 (1980).

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[5] See Sections 301-303 of the Social Security Act, 42 U.S.C. 501-503.

[6] See Sections 1-12 of the Act of June 6, 1933, ch. 49, 48 Stat. 113-117, 29 U.S.C. 49-49k.

The court of appeals affirmed (Pet. App. 1a-5a). It agreed with the district court that respondent's claim for declaratory and injunctive relief was identical to the claim adjudicated in *County of Los Angeles*, so that respondent's claim was barred by res judicata. The court of appeals further held that respondent's claim for a refund was barred by collateral estoppel. As the court concluded, respondent's claim for a refund turns on the same constitutional issues that the court in *County of Los Angeles* was required to resolve and did resolve in deciding the claim for equitable relief (Pet. App. 3a-5a). Neither of the courts below addressed the respondent's constitutional arguments or the federal government's jurisdictional and standing defenses.

REASONS FOR GRANTING THE PETITION

Respondent has filed a petition for a writ of certiorari in No. 82-593, seeking review of the decision of the court of appeals affirming the dismissal of respondent's suit on the grounds of res judicata and collateral estoppel. Although neither of the courts below reached respondent's argument that the 1976 Amendments to the Federal Unemployment Tax Act violate the Tenth Amendment, respondent's petition for certiorari in No. 82-593 seeks review of those issues as well. We intend to oppose respondent's petition. If that petition is granted, however, the Court should also grant this cross-petition in order to preserve the government's right to support the dismissal of respondent's suit on the basis of the jurisdictional and standing grounds not addressed by the courts below.[7]

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[7] Although it would appear that a cross-petition may not be necessary in order to raise an argument that does not seek to alter the judgment of the court of appeals, we are neverthe-

1. The district court lacks subject matter jurisdiction over this suit. The requested injunctive and declaratory relief is barred by statute, and the claim for a refund of unemployment insurance contributions is not a claim as to which the federal government has consented to be sued.

a. The Anti-Injunction Act, 26 U.S.C. 7421(a), bars respondent's claim for injunctive relief. That Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." The Anti-Injunction Act bars this suit because respondent seeks to restrain the government from denying FUTA tax credits to private employers for their contributions to a state unemployment fund even if the state fails to provide unemployment compensation coverage for state and local government employees. This suit is therefore an action to restrain the assessment and collection of a federal tax. See *County of Los Angeles* v. *Marshall*, 442 F. Supp. 1186 (D.D.C. 1977), aff'd on other grounds, 631 F.2d 767 (D.C. Cir.), cert. denied, 449 U.S. 837 (1980). Fur-

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less filing this conditional cross-petition out of an abundance of caution to preserve our arguments with respect to jurisdiction and standing. E.g., *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); see *Langnes* v. *Green*, 282 U.S. 531 (1931). Cf. *Strunk* v. *United States*, 412 U.S. 434 (1973); *NLRB* v. *International Van Lines*, 409 U.S. 48, 52 & n.4 (1972); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). Moreover, a cross-petition would not appear to be necessary where the objection to be raised is that the lower courts had no jurisdiction to consider the case. See *Peoria & P.U. Ry.* v. *United States*, 263 U.S. 528, 535-536 (1924); *Mattingly* v. *Northwestern Virginia R.R.*, 158 U.S. 53, 57 (1895). See also *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 359 (1932); *Capron* v. *Van Noorden*, 6 U.S. (2 Cranch) 125 (1804).

ther, the decisions of this Court establish beyond question that the constitutional nature of respondent's claim does not circumvent the bar of the Anti-Injunction Act. See *Commissioner* v. *"Americans United" Inc.*, 416 U.S. 752, 759-760 (1974); *United States* v. *American Friends Service Committee*, 419 U.S. 7, 11 (1974).

As this Court has held, the sole and exceedingly narrow exception to the Anti-Injunction Act is that an injunction may issue only when (a) "under the most liberal view of the law and the facts, the United States cannot establish its claim," and (b) equity jurisdiction otherwise exists because irreparable injury will occur in the absence of an injunction. *Enoches* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 6-7 (1962); *Bob Jones University* v. *Simon*, 416 U.S. 725, 742-746 (1974).

Respondent's suit fails both tests. This Court has ruled that federal grants and tax credits of the same character as those here are not coercive and do not intrude upon state sovereignty. *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 585-593 (1937); *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 525-526 (1937). Two courts of appeals, moreover, have rejected respondent's argument that the 1976 Amendments are unconstitutional. *County of Los Angeles* v. *Marshall*, 631 F.2d 767 (D.C. Cir.), cert. denied, 449 U.S. 837 (1980); *State of New Hampshire* v. *Marshall*, 616 F.2d 240 (1st Cir.), appeal dismissed, 449 U.S. 806 (1980). It therefore cannot be suggested that "under the most liberal view of the law," the government cannot prevail on the merits of its claim. Nor have respondents alleged the requisite irreparable injury—viz., injury without adequate legal remedy. To the contrary, a suit for refund

affords private employers a full opportunity to litigate the constitutionality of the tax. *Commissioner* v. *"Americans United" Inc.*, *supra*, 416 U.S. at 761-762. See, e.g., *Steward Machine Co.*, *supra*, 301 U.S. at 548.

Moreover, the states have an adequate remedy at law insofar as they are able to seek review of the Secretary of Labor's adverse determination. See, e.g., *State of New Hampshire* v. *Marshall*, *supra*; *State of Alabama* v. *Marshall*, 626 F.2d 366 (5th Cir. 1980), cert. denied, 452 U.S. 905 (1981). Congress has provided for judicial review of the Secretary's decision declining to certify the laws of a state as conforming to the 1976 Amendments to the Federal Unemployment Tax Act. Section 3310 of the 1954 Code (Appendix, *infra*, 1a) provides for review by the courts of appeals and by this Court of any such determination by the Secretary to withhold a state's certification. Furthermore, Section 3310(d) explicitly states that the Secretary may not withhold certification until after exhaustion of the time to petition for review, and that the courts "may thereafter grant interim relief if warranted, including a further stay of the Secretary of Labor's action and including such other relief as may be necessary to preserve status or rights."

Congress has therefore established a method for judicial review of questions of state certification, and these provisions adequately protect the interests of the state. Indeed, in *State of New Hampshire* v. *Marshall*, *supra*, a state advanced the identical constitutional challenge as respondent, and the Secretary's 1978 decertification decision was stayed pending review by the court of appeals. Given these well-established and effective review procedures, it is plain that respondent

has an adequate remedy at law. This suit is therefore barred by the Anti-Injunction Act.

b. Respondent's suit for declaratory relief is likewise barred by the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201-2202 (Appendix, *infra*, 4a). With one exception not pertinent here, that Act bars declaratory suits "with respect to Federal taxes." But respondent seeks a declaratory judgment respecting the federal unemployment tax liability of private employers who are not even parties. As this Court has observed, the bar of the tax exception to the Declaratory Judgment Act against such suits is at least as broad as the Anti-Injunction Act. See *Bob Jones University* v. *Simon*, *supra*, 416 U.S. at 732-733 n.7; *State of California* v. *Regan*, 641 F.2d 721, 723 (9th Cir. 1981).

c. Finally, this suit is barred by the doctrine of sovereign immunity. The United States has not consented to be sued for a refund of unemployment insurance contributions paid to a state. It is well established that the United States, as sovereign, may not be sued without its consent and that the terms of its consent define the Court's jurisdiction. E.g., *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *United States* v. *Shaw*, 309 U.S. 495, 500-502 (1940). When an officer of the sovereign issued, the general rule is that the suit is against the sovereign if " 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' *Land* v. *Dollar*, 330 U.S. 731, 738 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' *Larson* v. *Domestic & Foreign Corp.*, * * * [337 U.S. 682], at 704 [1949]." *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963). See also *Hawaii* v. *Gordon*, 373 U.S. 57,

58 (1963); *Louisiana* v. *McAdoo*, 234 U.S. 627, 633 (1914). The exceptions to this rule are "(1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void. *Malone* v. *Bowdoin*, * * * [369 U.S. 643], at 647 [1962]." *Dugan* v. *Rank*, *supra*, 372 U.S. at 621-622. These exceptions are inapplicable where, as here, the requested order would require affirmative action by the sovereign or affect the disposition of sovereign property. *Hawaii* v. *Gordon*, *supra*, 373 U.S. at 58; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949).

Even on the assumption that respondent's claim for a refund from the federal government of taxes paid to the State of California is otherwise a claim upon which relief can be granted, the government has not consented to be sued in this manner. Although 28 U.S.C. 1346(a)(1) (App., *infra*, 3a), upon which respondent relies (Pet. App. 48a), confers jurisdiction on district courts over civil actions to recover taxes or sums erroneously or illegally collected under the internal revenue laws, the unemployment insurance contributions that respondent paid to the State of California are not taxes or sums collected under the internal revenue laws. Rather, they are taxes paid to California as required by California law. Cal. Unemp. Ins. Code § 634.5 (West. Supp. 1982). Cf. *California* v. *Grace Brethren Church*, No. 81-31 (June 18, 1982), slip op. 2; *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 775 n.3 (1981).[8] While it is true that Cali-

[8] Respondent also erroneously relies (Pet. App. 78a) upon 28 U.S.C. 1331(a) (App., *infra*, 3a), which confers sub-

fornia in turn deposits such contributions in the Treasury of the United States, the contributions are held in trust for the State and will be returned to the State. *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 596 (1937); *Gillum* v. *Johnson*, 7 Cal. 2d 744, 762, 62 P. 2d 1037, 1045 (Sup. Ct. 1936). See Social Security Act, 42 U.S.C. 1104.

2. Furthermore, respondent lacks standing to bring this suit. As the Court held in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976), the "case or controversy" requirement of Article III of the Constitution requires that a federal court—

> act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.

There is no such injury in this case. The 1976 Amendments do not compel respondent to make unemployment insurance contributions to the State of California. Rather, the statutes of California require that respondent make those payments. Cal. Unemp. Ins. Code, *supra*, § 634.5. Furthermore, even if a district court were to declare the 1976 Amendments unconstitutional, it still would be highly speculative whether

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ject matter jurisdiction on the district courts over civil actions where the matter arises under the Constitution, laws or treaties of the United States. That statute does not constitute consent by the United States to be sued. See, e.g., *Estate of Watson* v. *Blumenthal*, 586 F.2d 925, 932 (2d Cir. 1978); *American Science & Engineering, Inc.* v. *Califano*, 571 F.2d 53, 63 (1st Cir. 1978); *Commonwealth of Kentucky ex rel. Hancock* v. *Ruckelshaus*, 362 F. Supp. 360, 367-368 (W.D. Ky. 1973), aff'd, 497 F.2d 1172 (6th Cir. 1974), aff'd *sub nom. Hancock* v. *Train*, 426 U.S. 167 (1976). But cf. *Ryan* v. *Federal Deposit Insurance Corp.*, 565 F.2d 762 (D.C. Cir. 1977).

the State of California would cease to require unemployment insurance contributions from respondent. And "unadorned speculation will not suffice to invoke the federal judicial power." *Simon* v. *Eastern Kentucky, supra*, 426 U.S. at 44. No matter what federal law provides, the final decision whether respondent must pay for unemployment insurance coverage for its employees rests with the State of California. "A State, of course, is free to expand its coverage beyond the federal minimum without jeopardizing its federal certification." *St. Martin Evangelical Lutheran Church* v. *South Dakota, supra*, 451 U.S. at 775, n.3. Cf. *Plumas County Board of Supervisors* v. *Califano*, 594 F.2d 756, 759-760 (9th Cir.), cert. denied, 444 U.S. 864 (1979).[9]

Nothing in this record shows, moreover, that the State of California either perceives or asserts any Tenth Amendment violation. Accordingly, the constitutional aspects of standing aside, as a prudential matter respondent is not the proper proponent of California's interest in preserving its sovereignty, especially since the object of respondent's suit is to avoid paying to California the amounts due to it under the law of that State. In sum, respondent has not been injured by the 1976 Amendments, and, even if the 1976 Amendments were held to be unconstitutional, respondent's obligation under state law to pro-

[9] Respondent's lack of standing is not cured by the provision of state law that automatically repeals the obligation of political subdivisions to provide coverage for their employees in the event that the Court declares the 1976 Amendments unconstitutional. See 1978 Cal. Stat. ch. 2, § 104 (West Supp. 1982) (Pet. App. 73a-75a.) A judgment of a district court would not trigger such a repeal, and, at all events, California could reinstate coverage of state and local government employees at any time.

vide unemployment insurance coverage for its employees might well continue unabated.[10]

CONCLUSION

The petition for a writ of certiorari should be granted, but only if the Court grants the petition in No. 82-593.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1982

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[10] Alternatively, even on the assumption that the obligation to pay unemployment insurance contributions to the State of California is an injury that confers standing upon respondent, it is plain that the suit must be brought in a state court. The Tax Injunction Act, 28 U.S.C. 1341, App., *infra*, 3a, provides that the district courts "shall not enjoin, suspend or restrain the * * * collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Last Term in *California* v. *Grace Brethren Church*, *supra*, the Court held that the Tax Injunction Act barred the district courts from entertaining a suit for declaratory and injunctive relief brought on First Amendment grounds by religious schools that sought relief from the obligation to pay unemployment insurance contributions to the State of California. Accordingly, even if respondent has standing so that a successful suit would terminate its obligation to pay contributions to the State, that suit can be brought only in a state court. See *Grace Brethren Church*, *supra*, slip op. 23, n.38.